NO. 6007

United States Circuit Court of Appeals

For the Ninth Circuit

MONTGOMERY WARD & COMPANY, a Corporation,

Appellant,

vs.

R. A. HAMMER, a Minor, by his Guardian ad litem, I. R. HAMMER,

Appellee.

Brief of Appellee

Upon Appeal from the United States District Court for the District of Oregon.

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STATEMENT OF THE CASE

The appellee, a minor, who will hereafter be referred to as the plaintiff, was seriously injured while performing his duties as an employe of appellant, Montgomery Ward & Company, which will hereafter be referred to as the defendant.

A few days prior to the accident plaintiff had been assigned to duties on the fifth floor of the building in which defendant conducted its business, and on the morning of the accident, pursuant to orders is-

sued by his superiors, had been engaged in moving merchandise from what are known in the record as pitracks. Photographs of these pitracks and a rough model thereof are part of the record on appeal. Suffice it to say that these racks were about six feet high, and on the top of each of the stalls or bins comprising the racks there was a lattice frame removable cover, resting on joists, but not fastened or secured thereto. It was customary for the defendant in the operation of its business to pile merchandise on the top of as well as in the racks, and when removing the merchandise from the top of the racks it was customary and necessary for the employes engaged in this work to stand and walk on the lattice coverings.

On the day of the accident plaintiff, pursuant to the directions of his superiors, had been moving merchandise from the top of the pitracks when he noticed an article of merchandise on top of one of the racks in the area which he had been directed to clear of merchandise. No means were provided employes to climb on or off the tops of the racks, so plaintiff followed a usual custom and stepped on a flat car standing in one of the aisles, and from there climbed on top of the racks. He then walked over the tops of several racks, picked up the merchandise and dropped it in the aisle. As he was walking back in a direct line with the flat car, in order to climb down on the car, one of the lattice coverings gave way as he stepped on it, and he fell on his back to the con-

crete floor, sustaining the injuries alleged in the complaint.

It was substantially alleged in the answer and admitted by the defendant at the trial that the rack from which the plaintiff fell was in a dangerous and defective condition, and "was not safe to be on." (Tr. of R. 49). No claim was made by the defendant that any person had warned the plaintiff of the condition of the rack. On the plaintiff's part is evidence affirmatively showing that he had no knowledge of the dangerous condition of the rack, and that there was nothing that called his attention to any defects or insecurity therein. (Tr. of R. 24, 52).

The defendant rightly says that there is only one question raised by this appeal, but the brief discusses matters not embraced within that question. No evidence was offered by the plaintiff to which the defendant objected; no evidence was offered by the defendant which was rejected by the Court; neither the pleadings nor the sufficiency of the evidence were challenged; no objections were made to the instructions which were given to the jury. So that the Court may be advised as to the sole question which may be raised by this appeal we quote the following from pages 64 and 65 of the Transcript of Record, which is the only statement in the record of any objections made or exceptions taken by the defendant. After the instructions had been given to the jury the Court

asked if there were any exceptions to the charge and the following occurred:

> "Mr. Wilbur—No exceptions, your Honor, to the instructions of the Court except the matters we have discussed here as to the instructions in the alternative—instruction on the common law and the Employer's Liability Law.
>
> Court—I understand that you mean that I should instruct the jury as to the common-law obligation of the defendant?
>
> Mr. Wilbur—In the alternative.
>
> Court—Well, I am asking that question.
>
> Mr. Wilbur—Yes, your Honor.
>
> Court—I want it explicit.
>
> Mr. Wilbur—Definite statement under the State Liability Law, and therefore the failure to give instructions under contributory negligence, assumed risk, and as set forth in the requested instructions.
>
> Court—Have you any exceptions?
>
> Mr. Bernard—No, I think not, your Honor."

After setting forth these proceedings, the Bill of Exceptions contains the following recital:

> "The statement of the defendant's counsel that he had no exceptions 'except the matters we have discussed here as to the instructions in the alternative,' refers to a discussion which was had as to whether the Court should instruct on the common-law liability of the defendant as well

as its liability under the employer's liability law."

ARGUMENT

The question apparently attempted to be presented to this Court by the defendant on this appeal is whether error prejudicial to the defendant was committed in the failure of the Court to instruct on the common-law liability of the defendant in addition to submitting the question of its liability under the Oregon Employers' Liability Act. In view of the record made at the trial, the only question properly before the Court is whether error prejudicial to the defendant was committed in the failure of the Court to give the defendant's requested instruction on assumption of risk and also its requested instruction to the effect that contributory negligence of the plaintiff would bar recovery by the plaintiff. It is conceded by the defendant that neither contributory negligence nor assumption of risk constitutes a defense to an action brought under the Oregon Employers' Liability Act, but the argument apparently is that in view of these requested instructions it was incumbent upon the Court without further request to instruct on the common law liability of the defendant as well as on its liability under the statute mentioned.

THE PLAINTIFF'S ACTION WAS BROUGHT UNDER THE EMPLOYER'S LIABILITY ACT OF OREGON.

Section 6785 Oregon Laws, provides among other things as follows:

> ". . . . . and generally, all owners, contractors or subcontractors, and other persons having charge of, or responsible for, any work involving a risk or danger to the employes or the public, shall use every device, care and precaution which it is practicable to use for the protection and safety of life and limb, limited only by the necessity for preserving the efficiency of the structure, machine or other apparatus or device, and without regard to the additional cost of suitable material or safety appliance and devices."

As a basis for its argument defendant says that the complaint pleads a cause of action under the common law and also under the Employers' Liability Act. An examination of the complaint will show that throughout it charges a violation of the statute and is not based on the common law liability of the defendant. After reciting the formal allegations and describing the employment of the plaintiff, and the locus in quo, the complaint charges wherein the work involved risk and danger (Tr. of R. 5-6, Paragraph VIII), the duty of the defendant to use every device, care and precaution as required by the statute (Tr. of R. 6. Paragraph IX), and the failure of the defendant to comply with the statute, and the particulars wherein the defendant could have made the work safe (Tr. of R. 6-7, Paragraphs X and XI). The al-

legations to which the defendant points as charging a common law liability are incidental to the charge of a violation of the statute. In any complaint drawn under the statute there will probably of necessity be some allegations, which standing alone, might charge a common law liability, but there can be no question that the complaint in this case was drawn under the Employers' Liability Act.

It Is Admitted That the Instructions of The Court on the Employer's Liability Act Were Free From Error.

No exception was taken at the trial to any of the instructions given to the jury. On the contrary counsel for the defendant expressly stated to the Court that he had none. The record discloses that the defendant requested instructions under the Employers' Liability Act, but the instructions as given by the Court so completely covered those requests that no exception was taken by the defendant to the failure of the Court to give any of the defendant's requested instructions on that feature of the case. In its brief, however, the defendant argues as error the statement of the Court at the start of the instructions that "This is an action brought under the Oregon State Employers' Liability Act which provides . .

. . . . .'' In support of its argument defendant cites a number of cases such as:

Wolsiffer v. Bechill, 76 Or. 516;
Yovovich v. Falls City Lumber Co., 76 Or. 585;
Mackay v. Commission of Port of Toledo, 77 Or. 611;
Wheeler v. Nehalem Timber Co., 79 Or. 507;
Rorvick v. North Pacific Lumber Co., 99 Or. 58;
Bottig v. Polsky, 101 Or. 530;
McCauley v. Steamship Willamette et al, 109 Or. 131.

None of these cases discuss the question as to whether the Court should have instructed on the common law liability of the defendant, but each of them is authority merely that under the facts in each of those cases it was proper to leave to the jury the question as to whether the work involved risk or danger. No principal announced in any of these cases was violated in the case at bar, for the Court at no time said or intimated to the jury that the case came under the Employers' Liability Act, or that the work in which the plaintiff was engaged involved risk or danger. What the Court did was to narrow the plaintiff's right to recover by telling the jury that the action was brought (not that the case came) under the Employers' Liability Act, and then said:

> ''In order for the plaintiff to recover in this action, he must prove by a preponderance of the

evidence that the plaintiff was injured at a place where he had gone in the performance of his duties as an employe of the defendant, and that the plaintiff was at the place where the accident occurred performing the duties he was required by the defendant to perform, and that the place where the plaintiff was performing his work at the time of the accident involved risk and danger . . . . .

If you find by a preponderance of the evidence . . . . . that the place where the plaintiff fell (that is the top of the pitrack) was a place involving risk and danger considering the work the plaintiff was required, if any, to perform, then it would be incumbent upon the defendant to use every care, device and precaution . . ."

We quote from page 33 of defendant's brief:

"In this case the writer of this brief does not think that the place where the plaintiff was injured was one involving risk or danger within the terms of the statute . . . . . We think it was highly improper for the Court to say to the jury all during the case and in the instructions that this was a place of danger under the State Employer's Liability Act."

Surely the able and experienced counsel who tried this case in the lower Court, if any such thought had occurred to him at the trial, would not have himself requested instructions asking that the jury pass on this very question, would not have expressly informed the Court that he had no exceptions to the instructions except the failure of the Court to go further and instruct on the common law liability of

the defendant, but would on the contrary have requested the Court to instruct that the work did not involve risk or danger. Certainly in view of the record which we have quoted, counsel should point out when during the case the Court said to the jury "that this was a place of danger under the State Employers' Liability Act." The fact is that at no time in the case did the Court say that the work involved risk or danger, but expressly left that question to the jury.

In view of the record in this case the instructions quoted above were more favorable to the defendant than the evidence justified, and the Court would have been warranted in instructing the jury that the place from where the plaintiff fell did involve risk and danger. The whole defense was based on the contention that walking on top of the pitrack from which the plaintiff fell did involve risk and danger. In substance the defendant so pleaded in its affirmative answer, and introduced testimony that a board on the front of the rack had split, so that the rack "was not safe to be on." (Tr. of R. 49). In view of this defense there was no dispute between the parties that if the plaintiff was working on top of the pitracks, and particularly if he did not know of the dangerous condition, as he contended, the work involved the greatest risk and danger, for the defendant not only admitted but asserted that the top of the pitrack would not bear any weight, and that by

stepping on it the plaintiff would fall to the concrete floor six feet below.

It Is Doubtful Whether The Practice in The State Courts of Oregon Permits The Court to Instruct on the Common Law Liability of the Defendant in an Action Brought Under the Employers' Liability Act.

At the trial of this case the writers of this brief felt that the decisions of the Supreme Court of Oregon rendered it uncertain whether the Court in a case brought under the Employers' Liability Act should instruct on the common law liability of the defendant. In view of this condition of the law we were willing to waive this ground of liability if any existed within the issues. In presenting this question we do so with no feeling that a decision thereof is necessary to a determination of this case, but merely because the defendant assumes that the court should have instructed on its common law liability. The cases cited by the defendant to which we have heretofore referred do not touch on the question. In treating of it we will refer to the other cases cited by the defendant.

Schulte v. Pacific Paper Co., 67 Or. 334.

In this case the trial Court left to the jury whether the case came under the Employers' Liability Act,

or whether the defendant was liable under the common law; in other words, submitted the defendant's liability in the alternative. On appeal by the defendant the case was reversed, the appellate court holding that the trial court should determine which law governs. This case is against the appellant in the case at bar, and, we believe, has never been overruled by the Supreme Court of the State of Oregon.

Hoag v. Washington-Oregon Corporation, 75 Or. 588.

Plaintiff, a lineman, was injured when the electric current was turned through some wires about which he was doing repair work. The lower court instructed on the liability of the defendant under the statute, and also under the common law and on the authority of Schulte v. Pacific Paper Co. *supra,* the case was at first reversed. On rehearing the Court merely held that in view of the record, error prejudicial to the defendant had not been committed in instructing as to both the liability under the statute and under the common law. We have examined the original records in that case and find that the defendant itself had requested instructions on defenses which were only available against a common law liability, and the court could not have escaped the conclusion that the error, if any, had been invited and acquiesed in by the defendant. Whether the fact that the defendant had become bankrupt pending the appeal,

and that the plaintiff, who had been seriously injured would not be able to recover if the case was reversed, influenced the opinion of the Court, we do not know, but the records pertaining to this matter were before the Court. The Schulte case was not overruled.

Poullos v. Grove, 84 Or. 106.

Plaintiff fell through a hole in the second story of a barn. The lower Court instructed the jury that if the plaintiff was guilty of contributory negligence he could not recover. The Court said:

> "A fair construction of the complaint in this instance makes out a cause of action within the purview of the legislation mentioned," (Employer's Liability Act)

and reversed a judgment in favor of the defendant because of the instructions on contributory negligence.

Stanfield v. Fletcher, 114 Or. 531.

Plaintiff's decedent was killed while working on a farm about a gasoline engine propelling a woodsaw. The lower Court submitted to the jury the question of whether the machinery was dangerous and the practicability of guarding it, and also gave an instruction on common law negligence. On appeal by the plaintiff from a judgment in favor of the defendant, the instructions under the Employers' Lia-

bility Act were approved but the case was reversed because of the giving of the instruction on common law negligence.

No case cited by the defendant holds that in an action brought under the statute the Court should instruct on the common law liability of the defendant. The nearest approach is the Hoag case, which merely held that in view of the record the defendant was not prejudiced by the Court so doing. On the contrary the Schulte case which holds that the Court should not so instruct, has never been reversed so far as we are able to determine, and the principals therein announced seem to have been followed in the later cases to which reference has been made.

The Appellant At No Time Requested That The Court Instruct On The Common Law Liability of the Defendant.

Before the defendant could be heard to complain that the Court failed to instruct as to its common law liability it would have been necessary that some request be made that the Court so do. The record discloses that during the trial a discussion was had on the matter, (Tr. of R. 65), and it is a fair inference that counsel for the defendant was then informed as to the views of the Court on what the instructions should be. Without more, counsel submitted instructions on the defense of assumption of risk and contributory negligence, without requesting at any time

that the jury be instructed on the common law liability of the defendant. Assuming that the court had given both of these requested instructions, the jury would have been left in total ignorance as to what was the common law liability of the defendant, if any, and as to when and under what circumstances it would have been liable under the common law. On page 15 of its brief, the defendant points to an allegation of the complaint as to the duty of the defendant to furnish plaintiff a safe place to work as proof that the complaint contains an allegation of liability under the common law. If the plaintiff was willing to waive this ground of common law liability, if it was such, but the defendant wished that issue submitted to the jury, it was the defendant's duty to submit full requests so that the jury would be informed as to the circumstances under which the defendant would be liable as well as to the circumstances under which it would be excused. We understand the law to be that when a party desires that a particular issue be submitted to the jury he must make appropriate requests therefor, (see *Texas & Pacific Railway Co. v. Volk,* 151 U. S. 73), and these requests must be full and complete and present the entire issue. In this case there is a total absence of any request that the jury be instructed as to the common law liability of the defendant, and therefore the question that the defendant attempts to raise by this appeal is not presented by the record.

NEITHER CONTRIBUTORY NEGLIGENCE NOR ASSUMPTION OF RISK IS A DEFENSE TO AN ACTION BROUGHT UNDER THE OREGON STATE EMPLOYERS' LIABILITY ACT AND THE DEFENDANT'S REQUESTED INSTRUCTIONS ON THESE MATTERS DID NOT CORRECTLY STATE THE LAW EVEN AS DEFENSE TO A COMMON LAW LIABILITY.

It is settled beyond question that neither contributory negligence of an employee nor assumption of risk is a defense to an action brought under the Employers' Liability Act. (*Blair v. Western Cedar Co.*, 75 Ore. 276). The court having submitted this case to the jury solely under the Act, the defendant's requested instructions on contributory negligence and assumption of risk were therefore properly refused. We might state in passing, however, that the requested instructions should have been refused even if the case had been submitted to the jury on a common law liability of defendant. Passing the question that the record is entirely devoid of evidence that the plaintiff jumped on the pitrack, as alleged in the Answer, the requested instructions on contributory negligence would not have confined the deliberations of the jury to the charge of contributory negligence attempted to be presented by the pleadings. The requested instruction on assumption of risk was likewise defective, because it left out the necessary element that assumption of risk is not predicable from mere knowledge of conditions alone, but the employee

must have appreciated the danger. (*Nutt v. Isensee*, 60 Ore. 395, 399).

THE FAILURE OF THE COURT TO INSTRUCT ON THE COMMON LAW LIABILITY OF THE DEFENDANT WAS FAVORABLE TO THE DEFENDANT, AND IF ANY ERROR HAD BEEN COMMITTED IN THIS RESPECT IT WOULD HAVE BEEN CURED BY THE VERDICT.

If we were disposed to waive all the questions heretofore presented, a complete answer to the defendant's contention is that if either party could have been prejudiced by the action of the Court in not instructing on the common law liability of the defendant it would have been the plaintiff and not the defendant. The defendant admits that there was sufficient evidence on which to submit to the jury whether the plaintiff had proved its case under the Employers' Liability Act. This the Court did and instructed the jury that if the plaintiff had failed to prove the case under that Act, the verdict must be for the defendant. Counsel is in effect complaining that the Court committed error in charging the jury that the verdict under such circumstances should be in favor of his client, and asserts that the defendant was prejudiced because the Court did not say that if the plaintiff had failed to prove his case under the Act, the defendant might still be liable under an entirely different theory. A bare statement of the claim carries its own refutation. Counsel is in the position of the man who admitted that he was justi-

fiably shot at with a gun, but complained that only one of the barrels was loaded. Under the issues upon which the case went to the jury the defendant would have benefitted if the jury had found that the plaintiff had failed to prove a case under the statute; under the issues on which its counsel says the case should have gone to the jury the defendant could have received no further benefit if the jury decided the plaintiff had failed to make out a case under the statute, but would have incurred another additional risk of an adverse verdict.

In the case of Dundee Petroleum Co. v. Clay, 267 Fed. 145, the plaintiff brought an action for a broker's commission. The Court instructed the jury that the plaintiff must prove an express contract in order to recover. The defendant submitted requests that the jury be instructed that the plaintiff might recover upon a quantum meruit if it found there was no express contract. These requests were refused. The appellate court held that even though it be assumed that the requested instructions were proper under the pleadings, the defendant could not have been prejudiced. Certiorari was denied in this case (255 U. S. 574). We deem that it is unnecessary to cite other authority to the proposition that on appeal a party cannot be heard to complain of a ruling of the trial court which was favorable to such party. The elimination from the instructions of one of the grounds authorizing a recovery by the plaintiff is

harmless to the defendant. (*Moore v. St. Joseph & G. I. Ry. Co.,* 268 Mo., 31, 186 S. W. 1035).

A further reason why the defendant is precluded from asserting the question it attempts to raise in this case is that the irregularity, if any, in failing to instruct on the common law liability of the defendant was cured by the verdict. The jury found that the plaintiff had made out a case under the Employers' Liability Act by a preponderance of the evidence, and therefore there would have been no occasion for them to consider the common law liability of the defendant, or the requested instructions on contributory negligence, and assumption of risk. The law is clear that under such a situation any irregularity is cured by the verdict, for the matter then becomes merely a moot question. (See *West Tennessee Grain Co. v. Schaffer,* 299 Fed. 197).

CONCLUSION

It will be noticed from an examination of the defendant's requested instructions on contributory negligence and assumption of risk that the instructions would not have carried within themselves the proposition that they were only applicable as a defense to a common law liability, but these two instructions are so drawn that laymen would believe from a reading of them that contributory negligence and assumption of risk was a complete defense to the

plaintiff's complaint. The sole advantage which could have accrued to the defendant from the giving of these instructions was that the jury might become confused and apply the instructions as a defense to the case which they found by their verdict the plaintiff had made out under the Employers' Liability Act. This constitutes no legal reason why the instructions should have been given.

Respectfully submitted,

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